STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,	UNPUBLISHED May 27, 1997
Plaintiff-Appellee,	
v	No. 200506 Oakland Circuit Court
MANUEL A. ORTIZ,	LC No. 93-126694
Defendant-Appellant	ON REMAND

Before: Corrigan, C.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

This case is before us for the second time. In our previous opinion, we reversed defendant's conviction of first-degree murder, MCL 750.316; MSA 28.548, on the basis that the verdict had been tainted by improperly admitted evidence. *People v Ortiz*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 1996 (Docket No. 171193). The Supreme Court remanded the case for reconsideration in light of *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994), and *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996). We now affirm.

In our previous opinion, we determined that the trial court improperly permitted Detective Susan Brown to read into evidence various complaints contained in police records regarding alleged assaultive conduct by defendant toward the decedent. We held that MRE 803(6), the business records exception to the hearsay rule, could not have justified the admission of the records. However, we did not address in our opinion whether this issue had been preserved. There is no indication in the record that defense counsel objected to this testimony. Defendant has provided an affidavit from defense counsel which states that an objection was raised at a bench conference. However, because this Court's review is limited to the lower court record, this affidavit will not be considered. See *People v Canter*, 197 Mich App 550; 496 NW2d 336 (1992). Accordingly, this claim of error was not preserved. Under the standard for unpreserved, nonconstitutional[1] error set forth in *Grant*, *supra* at 553, unpreserved error may not be considered for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where reversal is automatic. Defendant's claim of error in the admission of Officer Brown's testimony does not require automatic reversal, and, for reasons set forth below, we believe that the error could not have been decisive of the outcome.

In our previous opinion, we also concluded that the trial court erroneously admitted certain testimony pursuant to MRE 803(1), the present sense exception to the hearsay rule. Defendant timely objected to this testimony as constituting inadmissible hearsay. Where a case involves preserved nonconstitutional error, reversal is required only if the error was prejudicial. *Mateo*, *supra* at 215.

After reviewing the evidence in its entirety, we conclude that defendant was not prejudiced by the erroneous admission of the testimony. Elizabeth Osorio stated that less than three months before the incident, defendant threatened to kill the decedent. Julianne Rivera testified that several days before the murder, defendant said that the decedent "was going to pay for everything." Estella Amador stated that four or five days before the murder, defendant asked if the decedent was "messing around." Defendant then twice said that if he could not have the decedent, no one else would because he would kill her. Luz Rodriguez testified that two days before the incident, defendant had threatened to kill the decedent.

On the night of the incident, Osorio and Emery Rodriguez were awakened by defendant's entry into the house. Defendant asked where the decedent was and they indicated that she was in the bedroom. Defendant told them not to move or he would kill them. Osorio saw the handle of a knife in defendant's waistband. Defendant went into the bedroom and several witnesses heard him calling the decedent a whore. Defendant subsequently pulled the decedent out by the hair. Carmencita Ortiz testified that she heard defendant say, "I'm going to kill you" as he dragged her along. She next saw defendant sit on the decedent, pull a knife from his pants, and say, "Good-bye because I'm going to kill you." Defendant then stabbed the decedent in the chest.

When the police arrived, defendant was still on top of the decedent and a knife was at her side. A police officer asked, "Who did this?", and defendant responded, "I did, I did it." The decedent confirmed that defendant had stabbed her before dying as the result of multiple stab wounds.

After considering the above evidence, we find that the actual prejudicial effect of the error on the factfinder was negligible. Reversal is therefore not required. See *Mateo*, *supra* at 221.

Affirmed.

/s/ Maura D. Corrigan
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

[1] Because defendant has not raised the question of a violation under the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20, we address his claims of error under the standards for nonconstitutional error rather than the standard for constitutional error. We note, however, that even under the standard for constitutional error, we find that the errors were harmless beyond a reasonable doubt. See *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).